July 1, 1998

Mr. Stephen R. Alcorn
Assistant City Attorney
City of Grand Prairie
P.O. Box 534045
Grand Prairie, Texas 75053-4045

Open Records Decision No. 658

Re: Whether a final mediated settlement agreement, including financial and all other terms of that agreement, is confidential under section 154.073 of the Civil Practice and Remedies Code (ORQ-28)

Dear Mr. Alcorn:

In this request for an open records decision from the City of Grand Prairie (the "city"), we consider whether the Open Records Act (the "act"), chapter 552 of the Government Code, requires the public release of a governmental entity's mediated final settlement agreement. A prior decision of this office addressed to the City of Bellaire concluded that a mediated final settlement agreement is not public information based on section 552.101 of the Government Code in conjunction with section 154.073 of the Texas Civil Practice and Remedies Code. *See* Open Records Letter No. 98-0302 (1998). We overrule that open records letter and conclude that a governmental entity's mediated final settlement agreement is not made confidential by section 154.073 of the Texas Civil Practice and Remedies Code. Further, we decline to decide whether the act requires the public release of portions of a final settlement agreement where the issue of the confidentiality of those portions is pending before a court.

The city received several open records requests for final settlement agreements that the city reached in connection with two unrelated legal actions. One settlement agreement arose from the civil service appeal of an indefinite suspension by Mr. Blake Hubbard, a former city police officer.[1] *See generally* Local Gov't Code ch. 143, subch. D. The other agreement was reached during the course of a lawsuit filed in federal court against the city by Mr. Bryan McMillen and others. *See McMillen v. Clay*, No. 4-97CV-014-A (N.D. Tex. Feb. 13, 1998). Both of the settlement agreements resulted from mediation between the city and the opposing

[1]The Hubbard settlement agreement includes nine attachments.

parties.[2] Citing Open Records Letter No. 98-0302 (1998) as authority, you contend that because the settlement agreements were reached during the course of alternative dispute resolution ("ADR") procedures, the settlement agreements are confidential in their entirety pursuant to section 154.073 of the Civil Practice and Remedies Code and therefore must be withheld from the public pursuant to section 552.101 of the Government Code, a provision in the act that excepts from required public disclosure information that is made confidential by law. Additionally, you contend that the settlement agreement in the Hubbard case is excepted from required public disclosure pursuant to sections 552.103 and 552.107(1) of the Government Code.

The public release of the financial terms of the settlement agreement in the *McMillen* case is currently in litigation. You have submitted to this office a copy of a court order in the case of *McMillen v. Clay* signed by the Honorable John McBryde, United States District Court Judge, which, on joint motion of the parties, orders, among other things, "that the financial terms of any settlement agreement reached as would pertain [to] exchanges of consideration by and between or among the parties . . . be held confidential by the parties and anyone in privity or conjunction with them[.]" *McMillen v. Clay*, CA No. 4-97CV-0114-A (N.D. Tex. Feb. 13, 1998) (Order on Civil Justice Expense and Delay Reduction Plan, Article Three (3)(f)). This office has been informed, however, that WFAA-TV, Inc., and the Arlington Morning News have filed a Motion for Leave to Intervene and Motion to Modify Order regarding the confidentiality of the financial terms in that settlement. It is the policy of this office not to address issues that are being considered in pending litigation.

You contend that both of the requested settlement agreements are made confidential under section 154.073 of the Civil Practice and Remedies Code. We will therefore discuss this argument for non-disclosure first.

The Texas Legislature enacted the Texas Alternative Dispute Resolution Procedures Act (the "ADR Act"), codified as chapter 154 of the Civil Practice and Remedies Code, in 1987, noting that "[s]tudies of alternative dispute resolution document user satisfaction, perceptions of fairness, compliance with resolution, and reduced need for litigation." House Comm. on Judicial Affairs, Bill Analysis, S.B. 1436, 70th Leg. (1987). The stated policy of the ADR Act is "to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures." Civ. Prac. & Rem. Code § 154.002; *see also id.* § .003 (responsibility of all trial and appellate courts and their court

[2]The parties in the Hubbard case apparently participated voluntarily in alternative dispute resolution procedures in accordance with the Texas Alternative Dispute Resolution Procedures Act, chapter 154 of the Civil Practice and Remedies Code, and the applicable provisions of the Civil Justice Expense and Delay Reduction Plans adopted by the United States District Courts for the Northern and Southern Districts of Texas. You inform us that the parties in the *McMillen* case began mediation pursuant to the schedule established by the judge in the case. *See* Fed. R. Civ. P. 16(c)(9) (concerning settlement and use of special procedures to resolve dispute at pretrial conferences). We have no information concerning local court rules and orders governing the cases.

administrators to carry out ADR Act policy). Among the purposes of ADR procedures are the reduction of the backlog of court dockets, the resolution of disputes in a timely manner, and the reduction of litigation expenses. *See* Pryor and O'Boyle, PUBLIC POLICY ADR: CONFIDENTIALITY IN CONFLICT?, 46 SMU L. Rev. 2207, 2209-10 (1993).

Section 154.023 of the Civil Practice and Remedies Code recognizes mediation as an ADR procedure.[3] "Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them." Civ. Prac. & Rem. Code § 154.023; *see also id.* §§ 154.051 (appointment of impartial third parties), .052 (qualifications of impartial third party), .053 (standards and duties of impartial third parties).

To facilitate the prompt resolution of disputes in the ADR process, ADR procedures are typically conducted under terms of confidentiality. *See id.* §§ 154.053(c), .073(a). The promise of confidentiality encourages opposing parties to speak freely during the proceeding and thus promotes a candid exchange that is considered desirable for settlement. Sherman, CONFIDENTIALITY IN ADR PROCEEDINGS: POLICY ISSUES ARISING FROM THE TEXAS EXPERIENCE, 38 S. Tex. L. Rev. 541, 543 (1997).

Section 154.073 of the Government Code provides:

> (a) Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
>
> (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.
>
> (c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.
>
> (d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be

[3]The ADR Act includes four other ADR procedures: the mini-trial, the moderated settlement conference, the summary jury trial, and arbitration. *See* Civ. Prac. & Rem. Code §§ 154.024 - .027.

> presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

Section 154.073 accords confidentiality to "a communication . . . made by a participant in an alternative dispute resolution procedure," Civ. Prac. & Rem. Code § 154.073(a) and "[a]ny record made at an alternative dispute resolution procedure." *Id.* § 154.073(b). The city urges us to affirm the construction of this provision in Open Records Letter No. 98-0302 (1998). In that letter opinion, this office concluded that a settlement agreement reached between the City of Bellaire and an opposing litigant as the result of a mediation conference constituted a "record made at an alternative dispute resolution procedure" that was made confidential under section 154.073(b) and excepted from disclosure under section 552.101 of the Government Code. We now conclude that section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code does not make confidential mediated final settlement agreements to which a governmental body is a party, and to the extent Open Records Letter No. 98-0302 (1998) is in conflict with this open records decision, it is specifically overruled.

Section 552.101 of the Government Code excepts from public disclosure information that is confidential, including information deemed confidential by statute. A statutory confidentiality provision must be express, Open Records Decision No. 478 (1987); a confidentiality requirement will not be implied from the statutory structure. *See generally* Open Records Decision No. 465 (1987). We do not believe that by making confidential a "communication" relating to an ADR procedure and a "record" made in an ADR procedure in section 154.073, the legislature has evidenced a clear intent to protect from public disclosure mediated final settlement agreements of a governmental body.

Further, we believe the legislature intended to distinguish confidential ADR records and communications from final settlement agreements reached during mediation. The legislative distinction between a "record made at an ADR proceeding" and a mediated final settlement agreement is manifest in the ADR Act provision that specifically addresses such agreements. Section 154.071, the section providing for the effect of a written settlement agreement reached during an ADR procedure, provides as follows:

> (a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
>
> (b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.
>
> (c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

This section, in providing that a final, written and executed settlement agreement that was

made during an ADR procedure is enforceable in the same manner as any other written contract, provides a clear basis for distinguishing between such an agreement and a "record made at an alternative dispute resolution procedure." Since the agreement is to be enforceable in the same manner as any other contract, and may be incorporated into a court order, this section clearly does not contemplate that a written agreement disposing of the dispute falls into the category of a "record made at an alternative dispute resolution procedure" with the confidentiality afforded ADR communications and records. There is no suggestion in section 154.071 that if the final executed settlement agreement was achieved within the ADR procedure, that it becomes confidential. Nor is there a provision in section 154.073 for individual parties to waive the confidentiality of the communications and records as made confidential by subsections (a) and (b) of section 154.073.

Moreover, we believe the legislature has expressed its intent on the subject of the scope of confidentiality of mediation records. The Governmental Dispute Resolution Act (the "GDR Act"), chapter 2008 of the Government Code, authorizes the use of ADR processes by state agencies. Gov't Code § 2008.051. These processes must be consistent with the ADR Act and with the Administrative Procedure Act, chapter 2001 of the Government Code, and are intended to supplement other ADR procedures available to a state agency. *See id.* §§ 2008.051, .052. The GDR Act incorporates the ADR Act's confidentiality provisions, sections 154.053 and 154.073 of the Civil Practice and Remedies Code. Gov't Code § 2008.054(a). Additionally, section 2008.054(b)(1) of the GDR Act makes confidential a communication relevant to the dispute and certain records of communications made during the course of an ADR procedure. However, section 2008.054 (c) provides that

> [s]ubsection (b)(1) does not apply to a final written agreement to which a governmental entity is a signatory that is reached as a result of a dispute resolution procedure conducted under [the GDR Act]. Information in the final written agreement is subject to required disclosure, is excepted from required disclosure, or is confidential in accordance with other law.

This provision, we believe, ensures that the use of an ADR procedure will not cause any final agreements involving a state agency to be kept from the public. Because final agreements will not be considered communications under section 2008.054(c), the Open Records Act will apply normally to the documents. The recent enactment of the GDR Act provides clear evidence that the legislature does not consider confidentiality of final settlement agreements to be necessary to the success of the mediation process. While the GDR Act applies specifically to state agencies, we believe this law instructs us generally as to the legislature's intent regarding confidentiality of the mediation process of governmental bodies.

Given the above considerations, the city may not withhold final settlement agreements from public disclosure based on section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. We now consider the other exceptions raised for the public disclosure of the settlement agreement in the Hubbard case.

Section 552.103(a) of the Government Code reads as follows:

> (a) Information is excepted from [required public disclosure] if it is information:
>
> > (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
> >
> > (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

The city asserts that section 552.103 is applicable because the Hubbard settlement agreement relates to a pending lawsuit against the city and Officer Hubbard by the Calloway family. We conclude that section 552.103 is applicable to paragraphs 8, 9 and 10 of exhibit B and to exhibit G in its entirety. As for the remaining information, the city has not established the relatedness of the information to the pending litigation.

Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if

> it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records

Decision Nos. 574 (1990) at 5, 462 (1987) at 13-14.

The general rule of the attorney-client privilege provides that a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between various communicants. Tex. R. Civ. Evid. 503(b)(1). Rule 503(a)(5) reads as follows:

> A communication is "confidential" if not intended to be disclosed to third persons other that those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

As the settlement agreement here was signed by the opposing party, it is not a confidential communication subject to the attorney-client privilege. Accordingly, the city may not withhold the settlement agreement from disclosure based on section 552.107(1).

S U M M A R Y

> Open Records Letter No. 98-0302 (1998) is overruled to the extent that it conflicts with this decision. Section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code does not except from required public disclosure a governmental body's mediated final settlement agreement. Nor does section 552.107(1) of the Government Code except from disclosure such agreement in this instance. Section 552.103 of the Government Code protects from required public disclosure a portion of the settlement agreement that relates to pending litigation.

Yours very truly,

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